QUESTION PRESENTED

Whether Section 210 of the Energy Reorganization Act, which provides a comprehensive federal administrative remedy (including compensatory damages) for employees at nuclear facilities as an integral part of the government's program to ensure safety in the operations of those facilities, preempts state law claims for intentional infliction of emotional distress arising out of allegedly retaliatory changes in the terms and conditions of employment for raising safety concerns at a nuclear facility.

RULE 29.1 STATEMENT

General Electric Company has no parent company. The subsidiaries of General Electric Company that have outstanding equity or debt securities that are publicly held are listed in the brief in opposition to the petition for certiorari and in the supplemental brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-152

VERA M. ENGLISH,
Petitioner,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

1. Respondent General Electric Company operates a Nuclear Fuel Manufacturing Department in Wilmington, North Carolina. The Wilmington Department is a fuel fabrication plant. It uses "special nuclear material" as defined by the Atomic Energy Act, as amended, 42 U.S.C. § 2014(aa); 10 C.F.R. § 70.4(m), to produce bundles of uranium fuel rods used at nuclear reactor sites to generate electric power.

The Atomic Energy Act grants the Nuclear Regulatory Commission ("NRC") exclusive authority to issue a license for a fuel fabrication plant such as the Wilmington Department. 42 U.S.C. §§ 2073(a), 2077, 2021(b); 10 C.F.R. §§ 70.3, 70.21(a)(1). The Act also gives the NRC exclusive authority to establish such

standards "to govern the possession and use of special nuclear material . . . as the Commission may deem necessary . . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b). Pursuant to this authority, the NRC has promulgated comprehensive regulations governing the licensing and operation of fuel fabrication plants (see generally 10 C.F.R. Part 70). These include, for example, regulations governing the safety of workers and of the public (10 C.F.R. Part 20), the need to track and account for the large quantities of special nuclear material used in fuel fabrication (10 C.F.R. § 70.51), and the safety risks of "accidental criticality" that are posed by significant quantities of special nuclear material. 10 C.F.R. §§ 70.22(a)(8), 70.24.[1] The NRC will not issue a license if it "would constitute an unreasonable risk to the health and safety of the public." 10 C.F.R. § 70.31(d).

The Chemical Metallurgical Laboratory ("Chemet Lab") is located within the larger building that houses the Wilmington Department. Chemet Lab workers regularly conduct metallurgical, chemical and spectrographic analyses on uranium samples "to assure that standards of the [NRC] are met." Pet. App. 33a n.3. In performing these tests, employees work with both powder and liquid forms of uranium compounds. *Id.* The quality control responsibilities of the Chemet Lab workers are part of the Department's quality assurance program, which is

[1] The large quantities of special nuclear material used in a fuel fabrication plant pose special safety concerns because they far exceed the quantity needed to form a critical mass (start a self-sustaining nuclear reaction). 10 C.F.R. § 150.11. Thus, to obtain a license from the NRC for a fuel fabrication plant, an applicant must develop "procedures to avoid accidental criticality" (10 C.F.R. § 70.22(a)(8)) and describe how its "handling devices, working areas, shields, measuring and monitoring instruments, devices for the disposal of radioactive effluent and wastes, storage facilities, [and] criticality accident alarm systems" will be sufficient "to protect health and minimize danger to life or property." 10 C.F.R. § 70.22(a)(7), (f).

required by the NRC. 10 C.F.R. Part 50, App. B; 10 C.F.R. § 70.22(f) & n.2.

The Chemet Lab contains several laboratories. In "controlled areas" of these laboratories, specific safety precautions must be strictly observed. Before leaving a controlled area, a hand-held monitor or frisker is used to detect the presence of any radioactive contamination on a person's body or clothing. Workers must wear gloves, a lab coat and safety glasses in both controlled and semi-controlled areas. Pet. App. 33a n.3. The controlled areas contain hoods with fans that pull airborne radioactive contamination away from those working below. In addition, "[s]afety rules require that any spillage of uranium powder or uranium liquid be brushed or cleaned off from time to time during the work hours, and especially before leaving the work shift." *Id.*

2. Petitioner, Vera English, was employed as a radiation laboratory technician at the Chemet Lab for almost twelve years. She was responsible for performing certain quality control tests, "in which samples of uranium powder are weighed, oxidized, weighed again, dissolved in nitric acid and finally weighed again." *Id.* at 34a. Petitioner and other workers used marble work benches with marble legs because the "marble material is not affected by vibrations and is easier to clean than other material." *Id.* at 33a n.3.

On February 13, 1984, petitioner complained to the NRC about "what she perceived" to be violations of safety standards and Company procedures at the Wilmington Department. *Id.* at 7a-8a. On February 24, 1984, petitioner forwarded these same concerns in a written report (dated February 21, 1984) to the Company's Quality Assurance Manager. *Id.* at 8a, 34a.

The Company investigated her complaints on March 8-21 and March 26-30, 1984. *Id.* at 34a. A Chemet Lab Safety Report (dated March 29, 1984) concluded that lab safety procedures were adequate, but a subsequent

Quality Assurance Review (dated April 26, 1984) concluded that some of petitioner's allegations of "violations of company practice and procedure had substance." *Id.* Similarly, the NRC conducted an investigation into petitioner's complaints from March 26 through March 29, 1984. *Id.* at 33a. The NRC subsequently "concluded that [her complaints] were unsubstantiated." *Id.* at 34a.

After reporting her complaints, but prior to the NRC and Company investigations, petitioner (according to her subsequent testimony) took steps "to prove to management that her co-workers were extremely lax in their performance of clean-up duties." *Id.* at 35a. On March 10, 1984, petitioner discovered stains on her work table resulting from a spill of contaminated material. *Id.* at 8a, 34a. Petitioner purposefully chose not to clean the contamination, and decided instead to mark off the stained area with tape "as a warning to fellow workers" and "so she would be able to point it out to her supervisor" when he next returned to the lab. *Id.* at 35a. The contamination stain remained upon the table when she returned to work two days later, despite the interim presence of other shift workers. *Id.* at 8a. Petitioner reported the stain to her supervisor, and also reported to him that a radiation safety employee had failed on March 5 to detect contaminated nuclear material that she had deliberately swept into a pile at the back of her table "to see whether he would discover" it. *Id.* at 8a-9a.

3. On March 15, 1984, respondent charged petitioner with several safety violations, including intentional failure to clean up contamination. *Id.* at 36a-37a. Respondent determined that petitioner had committed the latter violation, relieved her of her laboratory responsibilities, removed her from any controlled areas and assigned her to a temporary position outside the controlled areas. *Id.* at 37a. Petitioner was advised to apply for an open position within the Department, outside of the Chemet Lab. Petitioner did not obtain such a position within 90 days, and so was laid off on July 30, 1984. *Id.*

4. On August 24, 1984, petitioner filed a complaint with the United States Department of Labor under Section 210 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. § 5851, and as implemented in 29 C.F.R. § 24.3.[2] Section 210 prohibits employers licensed by the NRC from discharging or changing the "compensation, terms, conditions, and privileges of employment" of any employee in retaliation for that employee's reports about nuclear safety, and entitles employees to full compensatory relief. Section 210 does not apply, however, to any employee who "deliberately causes a violation of [the Energy Reorganization] Act or the Atomic Energy Act, as amended." 42 U.S.C. § 5851(g) ("subsection (g)").

In her Section 210 complaint, petitioner alleged that her transfer from the Chemet Lab, her ultimate layoff and other related actions were taken by the Company in retaliation for her safety complaints. Pet. App. 46a. The Company claimed that under subsection (g), petitioner was not entitled to recovery because she deliberately caused a violation of safety standards by intentionally failing to clean up the spill; the Company also maintained that "the lengths [petitioner] would go to in promoting her views on safety practices" posed "a threat to other employees' safety." *Id.* at 42a. After an initial decision by the Administrator of the Wage and Hour Division, both parties appealed to an Administrative Law Judge ("ALJ"). *Id.* at 31a.

The ALJ conducted a "formal hearing" over 11 days during which "the parties were afforded full opportunity

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[2] Petitioner also filed a complaint with the NRC pursuant to 10 C.F.R. § 2.206. See Pet. App. 57a-58a. Although the NRC eventually issued a civil penalty of $20,000, based solely on the recommended ruling by the Department of Labor's ALJ, the NRC denied petitioner's request for further enforcement actions, including petitioner's request that the NRC impose a civil penalty of over $40 million. *Id.*

to present evidence and argument," and during which petitioner's psychologist testified concerning the emotional distress petitioner had suffered. *Id.* at 31a, 37a-39a. On August 1, 1985, the ALJ entered an order granting petitioner full compensatory relief. *Id.* at 56a. The ALJ found "little doubt that [petitioner] was a difficult employee to handle," and that "she disrupted workplace activity at times." *Id.* at 41a. The ALJ also recognized that petitioner's intentional failure to clean up the spill "was considered a violation [of the Atomic Energy Act] by NRC." *Id.* at 44a. Nevertheless, the ALJ held that, under the circumstances, petitioner's failure to clean up the spill should be deemed a protected "means of reporting violations, albeit unorthodox." *Id.* at 45a. The ALJ therefore ordered that petitioner be reinstated with back pay plus interest "to make her whole," and awarded her compensatory damages of $70,000 for past and future medical expenses as recompense for petitioner's "humiliation and mental suffering." *Id.* at 55a.

The Secretary of Labor subsequently reversed the ALJ's decision because petitioner's complaint was not filed within the 30-day limitations period provided in Section 210. On appeal, the Fourth Circuit affirmed the dismissal of petitioner's discharge claim as time-barred, but remanded to permit the Secretary to determine whether petitioner had established a course of retaliatory harassment within the filing time period. *English* v. *Whitfield*, 858 F.2d 957 (4th Cir. 1988). This case is still pending before the Secretary.

5. On March 13, 1987, petitioner filed a diversity suit against the Company in the United States District Court for the Eastern District of North Carolina. The complaint sought relief under state tort theories of wrongful discharge and "intentional infliction of economic and emotional harm by reprisal and punishment inflicted upon plaintiff in violation of the laws of the United States and North Carolina, with respect to her terms and conditions of employment." J.A. 7. For example, petitioner alleged

that after she reported her safety concerns, the Company removed her from the Chemet Lab under guard, constantly observed her and isolated her from other employees. J.A. 14-15. She also claimed that respondent transferred her to "a degrading 'make work' job" and subsequently discharged her because the Company "desire[d] to punish her for raising safety concerns." J.A. 16. For her two claims for wrongful discharge and intentional infliction of emotional distress, petitioner sought approximately $1.3 million in compensatory damages and approximately $2.3 *billion* in punitive damages. J.A. 21; Pet. App. 6a.

In a lengthy opinion, the district court dismissed the complaint, holding that Congress intended Section 210 to "preempt state actions for wrongful discharge and other discrimination with respect to nuclear whistleblowers." *Id.* at 21a. The court of appeals affirmed, adopting the district court's reasoning and agreeing that Section 210 of the ERA was "intended by Congress to constitute the sole remedy for nuclear facility employees who allege discrimination resulting from safety complaints, and, therefore, English's state law claim was preempted by the federal statute." *Id.* at 3a.

SUMMARY OF ARGUMENT

I.

A. Petitioner and her *amici* assume without arguing that Section 210 lies outside the field of nuclear safety. There can be no doubt, however, that the Atomic Energy Act and its progeny, including Section 210, occupy "the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Electric* v. *State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212 (1983). At the core of this field is the NRC's exclusive responsibility to ensure that nuclear facilities are licensed and operated in ac-

cordance with public health and safety requirements. 42 U.S.C. §§ 2012(e), 2073(b), 2201(b), 2133(b). One vital component of nuclear safety is the responsibility of all employees at nuclear facilities to report safety violations. 42 U.S.C. § 5846; 10 C.F.R. §§ 19.12, 21.21. The NRC so values these reports that it treats retaliatory employment action against such employees as an independent safety violation requiring serious penalties, including revocation of a license. 47 Fed. Reg. 30,453 (1982); 10 C.F.R. §§ 70.7(c), 19.20. Thus, Section 210, which prohibits such retaliation and protects employees who voice safety concerns, falls squarely within the comprehensive federal regulatory scheme to protect health and safety.

The importance of Section 210 to the framework of federal nuclear safety regulation is reflected in the NRC's regulations, in the legislative history of Section 210 (S. Rep. No. 848, 95th Cong., 2nd Sess. 2 (1978)) and in the structure of Section 210 itself. Section 210 is designed to encourage prompt federal action in response to employer retaliation, and to balance the need to protect the NRC's channels of information against the need to ensure that nuclear employers are not deterred from taking appropriate disciplinary actions. Reflecting Congress's careful and comprehensive concern about promoting nuclear safety, subsection (g) denies protection to alleged "whistleblowers" who deliberately cause violations of safety regulations. 42 U.S.C. § 5851(g). Because Section 210 is an integral part of Congress's exclusively federal scheme of nuclear safety regulation, this case should be analyzed under field preemption principles.

B. It is well settled that any state law that intrudes into an area occupied by the federal government is preempted, even if the state law's purpose is fully consistent with that of the federal government, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947), unless Congress expressly ceded the state authority to act. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251-256 (1984).

There can be no doubt that petitioner's claim invades that portion of the nuclear safety field defined by Section 210. *Id.* That provision, *inter alia*, grants petitioner compensatory relief for all claims of discrimination in any term or condition of employment imposed by respondent in retaliation for reporting safety violations. As the district court held, once the claims in petitioner's complaint that allege discrimination in terms and conditions of employment are deleted, what is left does not "in and of itself support a cause of action for intentional infliction of emotional distress" under state law. Pet. App. 28a.

The only remaining issue is whether Congress has expressly ceded North Carolina authority to regulate safety in the nuclear workplace through the use of its tort laws. The answer is clearly no. Neither petitioner nor her *amici* present one shred of evidence that Congress enacted Section 210 with the understanding that states could supplement the federal remedies with tort actions. Nor is there any basis for concluding that Congress did not preempt petitioner's claim because the State's purpose is not to regulate nuclear safety. Contrary to the argument of the Solicitor General, it is black letter law under the Supremacy Clause that it is irrelevant whether the state and federal laws "are aimed at similar or different objectives." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). Accordingly, petitioner's claim is preempted by Section 210.

II.

Even if Section 210 could be interpreted as outside the federally occupied field of nuclear safety, it is nevertheless plain that permitting petitioner's claims to be litigated in state court will "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Specifically, Congress intended to make certain that claims regarding retaliation were filed

promptly, and to balance the need to encourage employees to come forward with safety concerns against the need not to deter employers from taking appropriate disciplinary action to assure safe operations in a nuclear facility.

The district court correctly identified the elements of Section 210 that are jeopardized by state law: the 30-day time limit for filing; an administrative claim, the preclusion of relief for employees who deliberately violate a safety requirement and the decision to entrust only the Secretary with the discretion to seek punitive damages. Allowing state tort actions to be filed years after a safety problem exists (even if the problem is the employer's willingness to retaliate), and allowing damages to be awarded to employees without an expert evaluation of the regulatory and safety questions at issue will inevitably frustrate the achievement of Section 210's safety-related purposes.

Allowing employees to obtain punitive damages, moreover, will completely vitiate Congress's effort to promote safety through a balanced administrative scheme. It is simply inconceivable that a plaintiff's lawyer will be content to settle for the compensatory and back pay relief that Section 210 provides when state law holds out the promise of a *billion* dollar punitive award and the settlement leverage such an award offers. Moreover, the availability of a large punitive award creates the perverse incentive that the worst abuses by nuclear facilities would be precisely the ones a plaintiff would most want to bring only in state court, thereby depriving the NRC of information vital to nuclear safety. The repudiation of Congress's intent to encourage prompt administrative filings and not to deter employer responses to safety problems created by employees clearly must be preempted.

III.

Petitioner and her *amici* urge the Court to resolve this case under labor preemption principles. Although the case is more properly analyzed as a nuclear safety case,

the analogy to the labor laws provides an independent basis for affirming the judgment below.

By providing a specialized forum for evaluating workplace issues in an area—nuclear safety—traditionally regulated by the federal government, Congress in Section 210 has created a remedial scheme similar to the scheme administered by the National Labor Relations Board. The case that most closely fits this one under this labor analogy is *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977). But in that case, this Court did not hold that all claims for intentional infliction of emotional distress survive the existence of a federal remedy. Instead, the Court held that "it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened . . . ." *Id.* at 305. As noted above, the district court, applying the analysis in *Farmer*, held that once the employment discrimination claims are severed from the complaint, the remainder does not state a claim under state law. Thus, even apart from the federal interest in nuclear safety, petitioner's claim is preempted under traditional labor preemption principles.

ARGUMENT

The general principles of preemption are accurately described in the Solicitor General's brief (S.G. Br. 9-11) and need not be repeated here. Suffice it to say that petitioner's state law claim is preempted under both of two independent theories: Her claim (1) directly invades the field of nuclear safety which Congress has occupied exclusively for over 40 years and (2) creates an insuperable obstacle "to the accomplishment and execution of the full purposes and objectives of Congress" and therefore conflicts with the specific elements of Section 210. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In addition, her claim is preempted under well-settled principles of labor law preemption, which provide a useful analogy in

analyzing the Supremacy Clause issue in this case. We address each ground of preemption in turn.

I. A STATE LAW CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ARISING OUT OF RETALIATORY EMPLOYMENT ACTIONS AT A NUCLEAR FACILITY INVADES THE FIELD OF NUCLEAR SAFETY AND OPERATIONS AND IS THEREFORE PREEMPTED.

The Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §§ 5801 *et seq.*, exclusively reserve the entire field of nuclear safety to federal control. Congress has given the NRC exclusive authority over the licensing and regulation of nuclear facilities, and pursuant to this authority the Commission has enacted detailed regulations in furtherance of its paramount responsibility to protect the public from the health and safety hazards of nuclear operations. Any state law that, in effect, regulates the safe operation of a nuclear facility, regardless of its purpose or its potential to disrupt the federal scheme, is preempted to the extent it trespasses in this exclusively federal area. *Pacific Gas & Electric*, 461 U.S. at 212-213; see, *e.g.*, *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 183-84 (1983); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 231-36 (1947); *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941).

A. Congress Has Preempted The Entire Field Of Nuclear Safety And Operations.

In *Pacific Gas & Electric*, 461 U.S. at 205-212, this Court reviewed in detail the statutory language, structure and legislative history of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* Based on this review, the Court concluded that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." 461 U.S. at 212. In this, as in any preemption case, the touchstone of analysis is Congress's intent to preempt.

Fidelity Fed. Sav. & Loan Ass'n v. *De La Cuesta*, 458 U.S. 141, 152 (1982). The Atomic Energy Act provides the basic framework against which Congress's decision in 1978 to enact Section 210 must be interpreted.

As this Court explained in *Pacific Gas & Electric*, "[t]he Atomic Energy Act must be read" for preemption purposes against the unique background of exclusive federal control over nuclear energy. 461 U.S. at 206. Congress passed the Atomic Energy Act in 1954 to end the prior federal monopoly over all aspects of nuclear technology and allow private industry to participate in the commercial development of nuclear technology under a scheme of exclusive federal regulation and licensing. 461 U.S. at 207. In particular, Congress expressly reserved to the federal government the right to regulate nuclear facilities to assure the protection of health and safety.[3] *Id.* Congress gave the Atomic Energy Commission exclusive licensing authority for the possession and distribution of special nuclear material (42 U.S.C. §§ 2073, 2077), and empowered the Commission to establish such regulations "to govern the possession and use of special nuclear material . . . as the Commission may deem necessary . . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b).

The Atomic Energy Act of 1954 preserved intact the dual federal/state regulatory structure over the *sale and transmission* of commercial electric energy (42 U.S.C. § 2019), but did not provide any other regulatory role for the states, especially a safety role. In 1959, after extensive hearings on federal and state roles in regulating nuclear power, Congress added Section 274, which created only a limited role for states in the nuclear regulatory scheme—and then only by express agreement

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[3] See 42 U.S.C. § 2012(e) ("regulation *by the United States* of the production and utilization of atomic energy and of the facilities used in connection therewith *is necessary* in the national interest to assure the common defense and security and *to protect the health and safety of the public*") (emphasis added).

with the Commission.[4] 42 U.S.C. § 2021. Notably, Section 274 allowed the Commission to grant the states regulatory authority only for byproduct, source and "special nuclear materials in quantities not sufficient to form a critical mass." 42 U.S.C. § 2021(b). Congress thus carefully preserved the Commission's exclusive authority over other aspects of nuclear safety, including the licensing and regulation of plants, such as respondent's Wilmington Department, that use special nuclear materials in quantities far greater than that needed "to form a critical mass."[5] *Id.*; see 10 C.F.R. § 150.11 (defining critical mass). As this Court concluded in *Pacific Gas & Electric*, by reaffirming the exclusivity of federal authority over the field of nuclear safety concerns, the 1959 Amendments "reinforced th[e] fundamental division of authority" between the Commission and the states under which the states may share limited commercial regulation but the federal government has exclusive responsibility for nuclear safety. 461 U.S. 208.[6]

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[4] Congress also authorized the Commission to terminate any such agreement with a State "if the Commission finds that such termination or suspension is required to protect the public health and safety." 42 U.S.C. § 2021(j).

[5] In adding Section 274, therefore, Congress was careful not to create even the possibility that a state could regulate the health and safety aspects of a fuel fabrication facility such as the Wilmington Department. In any event, North Carolina does not have an agreement with the Commission to regulate even limited quantities of special nuclear materials.

[6] As the AEC explained during hearings on Section 274, "[q]uantities of special nuclear material which may present hazards of accidental criticality are excluded from the scope of the bill . . . . As a consequence . . . such activities as the processing of special nuclear material, *fabrication of fuel elements* and similar activities will remain subject to the licensing requirements and other regulatory controls of the Commission." *Federal-State Relationships in Atomic Energy Field, Hearings Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 297 (1959) (emphasis added).

Moreover, the Senate Report accompanying the 1959 amendments confirms that they were "not intended to leave any room for the

Subsequent developments underscore both Congress's awareness of and commitment to exclusive federal control over the operation and safety of nuclear facilities.[7] In 1969, for example, the General Counsel of the AEC published in the Federal Register the Commission's view that Congress, in amending the Atomic Energy Act in 1959, "*intended to preempt to the Federal Government the total responsibility* and authority for regulating, from the standpoint *of radiological health and safety*, the specified nuclear facilities and materials." 10 C.F.R. § 8.4(i) (emphasis added); see 10 C.F.R. § 8.4(d) (recounting history of 1959 amendments).

In 1974, Congress passed the Energy Reorganization Act, 42 U.S.C. §§ 5801 *et seq.*, which abolished the AEC and transferred its regulatory and licensing authority to the NRC. 42 U.S.C. § 5841(f). The 1974 Act also ex-

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exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials." S. Rep. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Admin. News 2872, 2879; see *id.* (recognizing "the dangers of conflicting, overlapping and inconsistent standards in different jurisdictions, to the hindrance of industry and jeopardy of public safety").

[7] This Court and numerous courts of appeals have consistently recognized the Commission's exclusive responsibility for ensuring nuclear safety. See *Power Reactor Dev. Co.* v. *International Union*, 367 U.S. 396, 404, 415 (1961) ("the responsibility for safeguarding that [public] health and safety belongs under the statute to the Commission"); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 526, 550 (1978) (NRC's "prime area of concern . . . is national security, public health, and safety"); *Northern States Power Co.* v. *State of Minnesota*, 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *County of Rockland* v. *N.R.C.*, 709 F.2d 766, 770 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983); *Rockford League of Women Voters* v. *N.R.C.*, 679 F.2d 1218, 1223 (7th Cir. 1982); *Porter County Chapter* v. *N.R.C.*, 606 F.2d 1363, 1370, 1372 (D.C. Cir. 1979); *Siegel* v. *Atomic Energy Comm'n*, 400 F.2d 778 (D.C. Cir. 1968); *State of New Hampshire* v. *Atomic Energy Comm'n*, 406 F.2d 170 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969); *Reynolds* v. *United States*, 286 F.2d 433 (9th Cir. 1960).

panded the number and range of safety responsibilities charged to the NRC, *e.g.*, 42 U.S.C. §§ 5843(b)(2)(A)-(B), 5844(b), 5877(c)), and (in Section 206) imposed new safety-related reporting requirements on responsible officers and directors of licensees. 42 U.S.C. § 5846. Finally, in 1978, Congress passed a set of amendments (including several that were safety-related) to both the Atomic Energy Act and the Energy Reorganization Act. Pub. L. No. 95-601, 92 Stat. 2947 (1978). Among them is Section 210, which encourages employees to report safety violations to the NRC, and provides the mechanism for protecting them against retaliation for doing so—unless they have deliberately violated safety regulations.

B. Section 210 Lies Squarely Within The Field Of Nuclear Safety Concerns.

Section 210 falls squarely within the field of nuclear safety concerns because it is intended to assist the NRC in carrying out its exclusive responsibility to ensure that nuclear facilities are licensed and operated in a manner consistent with public health and safety. The essential purpose of Section 210 is to ensure that employees are not deterred from performing "their responsibility to report promptly" to the NRC (10 C.F.R. § 19.12) by fear of retaliatory employment action.[8]

Section 210(a) states that no employer in the nuclear industry "may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment

[8] Respondent uses the term "retaliatory employment action" as a shorthand reference to the scope of conduct prohibited by Section 210. It is important to note that, by its plain terms, Section 210 covers neither all retaliatory acts nor all changes in the terms and conditions of employment. Instead, Section 210 covers only conduct that involves both of these concerns—retaliation for whistleblowing that takes the form of discharge or other changes in "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a). See pages 28-29, *infra*.

because the employee" has taken one of the following actions:

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated . . . in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a). Any employee who believes that he or she has been the victim of such retaliation may file a complaint with the Secretary of Labor within 30 days after the violation occurs. *Id.* § 5851(b)(1). The Secretary, who promptly notifies the NRC upon receipt of the complaint (47 Fed. Reg. 54,585), is required to conduct and complete an investigation within 30 days, and to issue an order within 90 days either dismissing the complaint or providing appropriate relief. Should a violation be found, the Secretary is authorized to award comprehensive injunctive relief and monetary "compensation."[9] Should an employer fail to comply with the Secretary's order, the Secretary is authorized "to file a civil action" in federal district court and has discretion to seek "all appropriate relief including, but not limited

[9] See 42 U.S.C. § 5851(b)(2)(B) ("the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant"); see also *id.* (providing for recovery of costs and attorney's fees).

to, injunctive relief, compensatory, *and exemplary* damages." 42 U.S.C. § 5851(d) (emphasis added).

1. The NRC's regulations implementing Section 210 and other provisions of the Energy Reorganization Act and Atomic Energy Act confirm that Section 210 is an integral part of the federal government's long-established exclusive authority to regulate the use of special nuclear materials and the safe operation of nuclear facilities. 42 U.S.C. §§ 2073(b) 2201(b), 2133, 2137, 5841(f). Pursuant to this authority, the NRC has adopted a comprehensive enforcement program, "the purpose" of which "is to promote and protect the radiological health and safety of the public, including employees' health and safety." 10 C.F.R. Part 2, App. C at 129-30. The NRC imposes detailed record-keeping and reporting requirements upon licensees such as respondent, and periodically conducts inspections to monitor compliance.[10] To assist the NRC in this oversight, Congress, in Section 206 of the Energy Reorganization Act, placed a special obligation on "any individual director or responsible officer" of a licensee: such persons must "immediately notify the Commission" of any failure to comply with any Commission rule or regulation related to certain safety hazards, and failure to report certain specified hazards may result in civil fines. 42 U.S.C. § 5846; 10 C.F.R. §§ 21.1, 21.21, 21.61; see 10 C.F.R. Part 2, App. C at 132.

The NRC's regulations also reveal the importance it places on receiving reports from *employees* concerning

[10] See, *e.g.*, 10 C.F.R. § 70.51 (material balances, inventory and record-keeping requirements); 10 C.F.R. § 70.52 (accident, loss and theft reporting requirements); 10 C.F.R. § 70.53 (material status reporting requirements); 10 C.F.R. § 70.54 (nuclear material transfer reporting requirements); 10 C.F.R. § 70.55 (NRC inspection requirements); 10 C.F.R. § 70.56 (licensee and NRC testing requirements); 10 C.F.R. § 70.57 (nuclear material measurement control program); 10 C.F.R. § 70.58 (fundamental nuclear material controls); 10 C.F.R. § 70.59 (effluent monitoring reporting requirements).

possible safety violations. Although employees, unlike directors and responsible officers, are not subject to civil penalties for a failure to report safety problems, the NRC has taken a number of steps to encourage them to notify the Commission of any violations they discover. The regulations require, for example, that employers establish procedures to ensure that responsible officers and directors in fact receive employees' reports of safety problems (10 C.F.R. § 21.21(a)(2)); in addition, employees must be "instructed of *their responsibility to report* promptly to the licensee any condition which may lead to or cause a violation of Commission regulations and licenses" (10 C.F.R. § 19.12) (emphasis added); allowed "to consult privately" with Commission inspectors during facility inspections concerning matters that may relate to "any violation of the [Atomic Energy] act" (10 C.F.R. §§ 19.14, 19.15); and allowed to "request" that the NRC conduct an inspection (10 C.F.R. § 19.16).

The NRC's regulations implementing Section 210 demonstrate that this provision, like Section 206, plays an integral role in ensuring that the NRC receives the information it needs to ensure safe operation of nuclear facilities. The Commission itself has explained that "to effectively fulfill its mandate, [the NRC] requires complete, factual, and current information concerning the regulated activities of its licensees. Employees are an important source of such information and should be encouraged to come forth with any items of potential significance to safety without fear of retribution from their employers." 47 Fed. Reg. 30,453 (1982); see also Pet. App. 41a ("The need to protect channels of information from being dried up by employer intimidation is the purpose of the Act"). Accordingly, "to ensure that employees are aware that employment discrimination for . . . contacting the Commission is illegal and that a remedy exists," the Commission has developed a standard form (Form NRC-3) that alerts employees to their reporting responsibilities and the protection afforded them by Section 210. 47 Fed. Reg. 30,453. The Commission

requires all licensees to keep this form posted "at locations sufficient to permit employees protected by [Section 210] to observe a copy on the way to or from their place of work." 10 C.F.R. § 70.7(e). Moreover, the NRC has entered into an agreement with the Secretary of Labor to ensure that it promptly receives notice of any Section 210 claim filed with the Secretary and can "cooperate to the fullest extent possible" in the investigation. 47 Fed. Reg. 54,585 (1982).[11]

Most telling, however, is the significance that the NRC places on retaliation against those who report safety concerns. Proof of such retaliation by a licensee is itself a safety concern so serious that it is grounds for, among other penalties, "denial, revocation, or suspension of the license." 10 C.F.R. § 70.7(c). See 10 C.F.R. Part 2, App. C at V.D and Supp. VII.A.4, B.4, C.4 (retaliation deemed comparable in severity to other "serious" safety violations). Accordingly, the NRC has investigated and punished licensees who retaliate against employees who raise safety concerns. See, *e.g.*, *In re Toledo Edison Co.*, EA 88-234 (Nov. 10, 1988) (modifying license and imposing $80,000 fine); *In re Tennessee Valley Auth.*, EA 86-93 (July 10, 1986) ($150,000 fine); *In re Illinois Power Co.*, EA 86-143 (Dec. 17, 1986) ($50,000 fine); see also note 2, *supra*.

2. The NRC's integration of Section 210 into its core safety and licensing responsibility is fully consistent with Congress's intent. Indeed, it is apparent from the legislative history and structure of Section 210 that Congress intended to integrate this provision into the broader

[11] The Secretary of Labor has recognized the employee's important role in providing information to the NRC. See, *e.g.*, *Nunn* v. *Duke Power Co.*, A.L.J. Dec., Vol. 1, No. 4, 84-ERA-27 (July-Aug. 1987) (As set out in Form NRC-3, "violations of NRC rules should be reported immediately to the employee's supervisor and if adequate corrective action is not taken, then to N.R.C."); *Wilson* v. *Bechtel Constr., Inc.*, A.L.J. Dec., Vol. 2, No. 1, 86-ERA-34 (Jan.-Feb. 1988) (same).

scheme of nuclear safety regulation over which it had given the NRC exclusive control. As the Senate Report accompanying Section 210 explains, "[u]nder this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act." S. Rep. No. 848, 95th Cong., 2nd Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7303, 7304. Rep. Udall, in alerting his colleagues in the House to the Senate bill in which the language of Section 210 first appeared, underscored the link between the NRC's exclusive responsibility for ensuring nuclear safety and the role of Section 210:

> [T]he other body does have language in its bill dealing with the subject of whistleblower protection, language which I look upon sympathetically. . . . I, for one, believe that *the NRC must be able to protect its sources of information to do an effective job of protecting the health and safety of the American people.*

124 Cong. Rec. 33,255 (1978) (emphasis added).[12]

Moreover, the structure of Section 210 confirms what the legislative history makes plain, which is that Congress viewed employee protection in the nuclear context not simply as an end in itself, but as a *means* to the ultimate end of enhancing nuclear safety.[13] For example, if employee protection were the only significant purpose for Section 210, then the requirement that any complaint

[12] See also 124 Cong. Rec. 29,769 (1978) (statement of Sen. McClure) ("Finally, the Committee has recommended a provision to protect any worker who is discriminated against by his employer for *providing assistance to the NRC in the discharge of its regulatory responsibilities*") (emphasis added); Pet. App. 18a-19a ("the legislative history" of Section 210 indicates that safety concerns are "inextricably intertwined" with employee protection).

[13] See *DeFord* v. *Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983) ("The purpose of the Act is to prevent employers from discouraging cooperation with NRC investigators, and not merely to prevent employers from inhibiting disclosure of particular facts or types of information").

be brought within 30 days of the alleged violation would seem unnecessarily strict. But this short time-requirement makes perfect sense given the broader recognition, explicit in the NRC regulations, that the fact of employer retaliation is itself a serious safety concern: The NRC views retaliation as an independent basis for revoking or modifying a license, and as an action which should be reported to the NRC without delay.[14] See page 20, *supra*.

The structure of Section 210 also reflects Congress's awareness that whistleblower protection, while critical to achieving optimal workplace safety, nevertheless carries its own threat to safety if abused. This recognition of the need to balance the provision of employee protection against the broader concern of ensuring overall workplace safety is explicit in subsection (g). This provision denies statutory protection "to any employee who, acting without direction from his or her employer . . . deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended." 42 U.S.C. § 5851(g). The Senate Report explains that Congress added subsection (g) "to avoid abuse of the protection afforded under this section" (S. Rep. No. 848 at 30).

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[14] *Amici* National Conference of State Legislatures, *et al.* ("NCSL") relies (Br. 17) upon Congress's decision to use the Secretary of Labor to administer Section 210 as evidence that Congress did not intend to use that provision to promote safety concerns. But the memorandum of understanding between the NRC and the Secretary (47 Fed. Reg. 54,585) reveals clearly the closeness of the relationship between Section 210 and the NRC's plenary authority to control safety in the operations of a nuclear facility. It seems obvious that Congress chose the Secretary of Labor to receive these complaints in order to encourage individuals to file them. Congress recognized that employees, such as petitioner, who have attempted without success to bring a safety concern to the attention of the NRC would be more willing to file a complaint if it would be heard by a neutral, third party. Thus, the Secretary's role is fully consistent with the provision's purpose of promoting safety in the operation of a nuclear facility.

By excluding from coverage those employees who themselves have deliberately caused a safety or other violation, Congress intended subsection (g) to assure employers that they can take appropriate measures to discipline employees who deliberately create safety hazards, without running a significant risk of liability. As petitioner's own conduct illustrates, the question whether an employee has deliberately violated safety regulations and thereby poses a threat to the health and safety of workers and the public lies at the heart of the safe operation of a nuclear facility. In the context of four decades of exclusive federal control over nuclear safety, "[i]t is unlikely —to say the least—that Congress intended" to allow this vital question to be resolved under "a variety of common-law rules," *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 496-97 (1987), or to allow tort actions in state courts to strip employers of the immunity so carefully built into subsection (g), when the alleged "whistleblower" is also a safety violator. The inclusion of subsection (g) alone establishes that Congress intended Section 210 to operate as an integral part of the system of exclusive federal control over nuclear safety.

Congress's approach to the controversial and important subject of punitive damages is also revealing. If Congress's sole interest was to encourage workers to bring complaints by deterring retaliation, it would have authorized employees to obtain punitive damages[15] (and might well have dispensed with administrative review altogether). Instead, Section 210(b)(2)(B) authorizes only the Secretary to seek punitive damages, and then only when the employer has compounded the underlying violation by flouting the Secretary's remedial order. 42 U.S.C. § 5851(d). It is desirable, for safety reasons, for employers not to be deterred from taking appropriate disciplinary action, and the clear limit in Section 210 on

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[15] Whistleblower-protection provisions in two other statutes expressly allow the employee to seek punitive damages. See Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(2)(B)(ii); Toxic Substances Control Act, 15 U.S.C. § 2622(b).

the use of punitive damages reflects the statute's overall purpose of enhancing the safe operation of nuclear facilities.[16]

As this Court has often observed, "'[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985), quoting *Northwest Airlines, Inc.* v. *Transport Workers, Inc.*, 451 U.S. 77, 97 (1981). Moreover, as with other statutes providing comprehensive enforcement procedures, in construing Section 210 the Court may reasonably conclude that important "policy choices [are] reflected in the inclusion of certain remedies and the exclusion of others. . . ." *Pilot Life Ins. Co.* v. *DeDeaux*, 481 U.S. 41, 54 (1987). Here, Congress's decision to allow only the Secretary, and not employees, to seek punitive damages makes eminently good sense in light of the overall safety purposes of Section 210.

Given the long history of exclusive federal control over nuclear energy, Congress is presumed to have been aware when it added Section 210 to the Energy Reorganization Act that it was legislating in an area of exclusive federal control. *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972). Indeed, Congress could not have chosen simply to build on existing state remedies because the aspect of

[16] See, *e.g.*, *Guy* v. *Travenol Laboratories, Inc.*, 812 F.2d 911, 917 (4th Cir. 1987) (recognizing the "danger that the always uncertain prospects of [wrongful discharge] litigation will deter employers . . . from legitimate personnel decisions"); *Dartey* v. *Zack Co.*, 82-ERA-2, slip op. 11 (Secretary's Decision, April 25, 1983) (employer "may well have been justified in firing" employee, but instead suspended him "out of an excess of caution because . . . it was mindful of the protections of section 5851"); *Wood* v. *Yeargin Constr. Co.*, 79-ERA-3, slip op. 8-9 (Secretary's Decision, Nov. 8, 1979) (dismissing section 210 claim and noting that "[i]n view of the risk to the plant and public offered by [employee's] propensities, his discharge was overdue when it occurred").

employee protection at issue here (unlike in *Silkwood*) is not a traditional area of state concern. When Congress enacted Section 210 in 1978, the vast majority of states did not even recognize a cause of action for wrongful discharge,[17] and state law with regard to "intentional infliction of emotional distress" was no more clear or consistent than it is today. See *Atchison, T. & S. F. Ry.* v. *Buell*, 480 U.S. 557, 568-70 & nn. 17-19 (1987) (discussing at length "the doctrinal divergences" in state law on intentional infliction of emotional distress).

3. Petitioner and the United States assert, but do not argue directly, that Section 210 lies outside the field of nuclear safety regulation. Pet. Br. 22 n.9; S.G. Br. 12.

[17] Under the at-will doctrine, terminated employees cannot recover damages under a cause of action for wrongful, abusive or retaliatory discharge. By 1978 only ten states had recognized a cause of action where an employer terminated an employee in clear contravention of a strong public policy of the state or in bad faith. See *Petermann* v. *International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. 1959); *Frampton* v. *Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Monge* v. *Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974); *Nees* v. *Hocks*, 536 P.2d 512 (Or. 1975); *Sventko* v. *Kroger Co.*, 245 N.W.2d 151 (Mich. 1976); *Jackson* v. *Minidoka Irrigation Dist.*, 563 P.2d 54 (Idaho 1977); *Fortune* v. *National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *O'Sullivan* v. *Mallon*, 390 A.2d 149 (N.J. 1978); *Harless* v. *First National Bank*, 246 S.E.2d 270 (W. Va. 1978); *Reuther* v. *Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. 1978). Moreover, when Section 210 was enacted, eight states had expressly rejected such a cause of action. See *Raley* v. *Darling Shop of Greenville, Inc.*, 59 S.E.2d 148 (S.C. 1950); *Stephens* v. *Justiss-Mears Oil Co.*, 300 So.2d 510 (La. App. 1974); *Yanta* v. *Montgomery Ward & Co., Inc.*, 224 N.W.2d 389 (Wis. 1974); *Hinrichs* v. *Tranquilaire Hospital*, 352 So.2d 1130 (Ala. 1977); *Segal* v. *Arrow Industries Corp.*, 364 So.2d 89 (Fla. App. 1978); *Georgia Power Co.* v. *Busbin*, 250 S.E.2d 442 (Ga. 1978); *Scroghan* v. *Kraftco Corp.*, 551 S.W.2d 881 (Ky. App. 1977); *Dockery* v. *Lampart Table Co.*, 244 S.E.2d 272 (N.C. App. 1978). While today at least 26 states allow common law exceptions to the at-will doctrine, whether a discharged employee can recover depends upon the particular state's law. Thus, when Congress enacted Section 210, it did not impose an administrative scheme upon an area traditionally regulated by the states.

They attempt to hide behind the district court's statement that the "paramount purpose" of Section 210 is not to promote nuclear safety (Pet. App. 19a), and move on to argue against preemption on other grounds. But the district court's observation provides no real shelter, for two reasons. First, as the foregoing discussion illustrates, the district court simply erred in viewing Section 210 apart from its statutory context and history. Second, the district court asked the wrong question. By stating that "[t]he question, therefore, is whether Congress put safety or employee protection first" (Pet. App. 19a), the district court implied that Section 210 could have only one significant purpose. Statutes as complex as Section 210 typically have multiple purposes, however, and the relevant question for preemption purposes is whether promoting nuclear safety is at least *one* of Section 210's important purposes. The NRC's regulations alone establish that Section 210 is an integral part of the NRC's exclusive and core responsibility to ensure the safe operation of nuclear facilities.

The Solicitor General's further argument that Section 210, as a single provision, cannot "occupy a 'field' " (S.G. Br. 8) is similarly without merit. By asking the Court to view Section 210 in isolation from the statute it amended, the Solicitor General arbitrarily compartmentalizes the analysis. The Solicitor General's approach would have merit if Congress had enacted Section 210 alone as a private, federal cause of action and had not enacted the Atomic Energy Act or the Energy Reorganization Act. Compare *California* v. *ARC America Corp.*, 109 S.Ct. 1661 (1989) (passage of one remedial statute does not necessarily preempt complementary state remedial action). But Congress enacted Section 210 as an integral part of the entire package of nuclear safety legislation. A proper field-preemption analysis, no less than any proper statutory analysis, must take into account the broader statutory framework of which a particular provision is simply one part. *E.g.*, *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Bd.*, 474

U.S. 409, 422-23 (1986). Section 210's statutory structure confirms what is apparent from the legislative history and from the NRC's implementing regulations: Congress intended Section 210 to be interpreted as an important part of the broader scheme of federal nuclear safety legislation that defines an area of exclusive federal control, off limits to all state regulation—that which conflicts *and* that which may complement the federal scheme.

C. Section 210 Preempts State Law Claims For Intentional Infliction Of Emotional Distress That Arise Out Of Retaliatory Employment Action For Whistleblowing At A Nuclear Facility.

1. Because Section 210 falls squarely within "the entire field of nuclear safety concerns" (*Pacific Gas & Electric*, 461 U.S. at 212) over which Congress has given the federal government exclusive authority, it necessarily follows that Congress has displaced state law remedies for this same conduct. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 250-51, 256 (1984) (acknowledging that state tort law remedies can intrude into the field of nuclear safety regulation). As the district court correctly recognized, virtually all of the conduct supporting petitioner's claim for intentional infliction of emotional distress is conduct related to the "terms, conditions, and privileges of employment" for which Section 210 provides a comprehensive compensatory remedy. Pet. App. 18a, 28a; J.A. 7. To determine, as a matter of state law, whether these changes in the terms of employment constituted "outrageous conduct" or were instead an appropriate response, consistent with subsection (g), to an employee who posed a significant risk to workplace safety, the jury would necessarily be forced to consider and resolve questions of the proper operation of a nuclear facility that Congress intended the Secretary of Labor, in consultation with the NRC, to address.[18]

[18] The proceeding before the ALJ in this case illustrates the overlap between petitioner's state law claim and the scope of Section 210. The ALJ held 11 days of hearings, heard testimony from petitioner's psychologist concerning her emotional distress, and

It is worth emphasizing that the preemption of state tort law in this context is not an all-or-nothing proposition. A proper preemption analysis requires a court to examine the state law claim against the field that Congress has occupied. Section 210 provides a safety-related mechanism for protecting employees in the nuclear industry against retaliatory employment action for their legitimate attempts to report safety concerns. Federal law preempts this subject, even if the employee characterizes the employer's employment-related discipline as a tort. To the extent the employee's claim arises from conduct clearly outside the scope of Section 210, however, state law is not displaced. See note 8, *supra*.

In this case, the district court performed precisely this analysis. Although it held that petitioner's allegations stated a claim for intentional infliction of emotional distress, it also held that what is left of petitioner's complaint after removing those allegations that are within the ambit of Section 210 "would not in and of itself support a cause of action" under North Carolina law for intentional infliction of emotional distress. Pet. App. 28a. This interpretation of state law by a district judge sitting in North Carolina, which was affirmed by the court of appeals, is ordinarily not subject to review by this Court,[19] and has never been challenged by petitioner and her *amici*. Nor could it be.[20]

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awarded petitioner $70,000 damages "as recompense for [her] humiliation and mental suffering." Pet. App. 37a-39a, 55a. See also *id.* 45a-46a n.8 (Secretary "must determine whether Claimant's overall conduct was so generally inimical to Employer's interests and so excessive as to be beyond the protection of the statute . . . . [and] balance the setting in which the activity arises and the interests and motivations of both Employer and Employee").

[19] See, *e.g.*, *Bowen* v. *Massachusetts*, 108 S.Ct. 2722, 2739 (1988); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 629-30 (1946).

[20] The district court's interpretation is plainly correct. In interpreting a complaint in this area, a court must be guided by the

Petitioner therefore is simply wrong in arguing (Pet. Br. 18) that if this Court holds her particular tort claim preempted, then it must hold that all tort claims against an employer are preempted. Petitioner contends that if respondent "decided to retaliate against Ms. English for her activities by hiring some 'thugs' and actually *physically* assaulting her, the decision below leaves her with no remedy for injuries and medical bills." *Id.* Nonsense. A decision to hire thugs to assault an employee is hardly a decision to change the "terms, conditions, and privileges of employment" within the meaning of Section 210. This Court has never had difficulty distinguishing between claims for "intentional infliction of emotional distress" arising out of changes in the terms and conditions of employment and similar claims arising out of other illegal conduct. *E.g.*, *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 303-07 (1977). Thus, in holding petitioner's claim preempted in this case because it is based on the same employment-related conduct addressed by Section 210, this Court need not and should not reach out to preempt state law remedies for injuries inflicted on whistleblowing employees through conduct other than that "arguably within the compass of" Section 210, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 246 (1959).[21]

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rule that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). Here, dismissal of the complaint is consistent even with petitioner's broadest allegations. Her claims of ridicule and harassment are allegations which by definition will exist almost always whenever an employee is subjected to discriminatory terms and conditions of employment. These allegations are fully cognizable under Section 210. *English* v. *Whitfield*, 858 F.2d 957, 963-64 (4th Cir. 1988).

[21] In evaluating the sweep of the preempted field defined by Section 210, the Court should employ the same standard embraced for labor law preemption, viz., there can be no remedy under state law for conduct that either is prohibited or is "arguably" prohibited by Section 210. *Garmon*, 359 U.S. at 246. This rule fully protects the federal interest while allowing the states to provide remedies

2. In *Pacific Gas & Electric*, this Court affirmed the principle that when Congress has preempted a field, state law that intrudes into that field is preempted, regardless of its purpose or potential for conflict, unless there is evidence that Congress "expressly ceded to the States" the authority to act. *Id.* at 212. Thus, the appropriate analytic framework in this case is precisely the opposite of that put forth by petitioner and her *amici*. This is not a situation where the Company must demonstrate manifest congressional intent to preempt this specific state tort rule; the "special features" of the congressional scheme regulating nuclear safety establish Congress's preemptive intent. *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 638 (1973). Instead, it is incumbent upon petitioner to demonstrate that Congress specifically intended to authorize a tort action that overlaps with a Section 210 proceeding.

In both *Pacific Gas & Electric* and *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court upheld state laws that operated in fields where Congress had expressly ceded the states a role. In *Pacific Gas & Electric*, the Court upheld the California moratorium on new plant construction because Congress had expressly conferred upon the states the right "to determine—as a matter of economics—whether a nuclear plant . . . should be built." 461 U.S. at 222.

In *Silkwood*, the Court recognized that allowing state law remedies for those injured by radiation in a nuclear plant intruded on the exclusive field of nuclear safety. *Id.* at 250-51, 256. The Court upheld the state law at issue in *Silkwood* against field preemption, however, because it found express evidence in the legislative history

for conduct that simply has nothing to do with Section 210. Thus, for instance, because acts of violence are not arguably within Section's 210's prohibition, state law torts for assault or battery would not be preempted.

of the Atomic Energy Act,[22] consistent with the test established in *Pacific Gas & Electric*, 461 U.S. at 212, that "Congress assumed that traditional principles of state tort law would apply with full force" to compensate those who suffered radiation injuries, and "intended . . . to tolerate whatever tension" might result with the NRC's exclusive authority over nuclear safety. 464 U.S. at 255-56. The Court found further support in the fact that Congress had *not* provided any comparable remedy for victims of radiation. *Id.* at 251. In so holding, the Court emphasized that its holding was a narrow one limited to "damages for radiation injuries," and was *not* intended to "suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law." *Id.* at 256.

There has been no showing in this case, nor could there be a showing, that Congress expressly ceded to the states the right to regulate the aspect of nuclear safety otherwise fully regulated by Section 210. Neither petitioner nor the United States is able to point to anything in the language or the legislative history of Section 210, the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended, that refers in any way to the right of states to regulate the aspect of nuclear safety addressed by Section 210.[23]

[22] Specifically, the Court looked to the legislative history of the Price-Anderson Act of 1957, Pub. L. No. 85-256, 71 Stat. 576 (which amended the Atomic Energy Act), and to subsequent amendments of Price-Anderson. 464 U.S. at 251-55.

[23] Petitioner does suggest that in Section 274(k) of the Atomic Energy Act, as amended, 42 U.S.C. § 2021(k), Congress granted states authority "to regulate activities connected with atomic energy." See Pet. Br. 21-22. Subsection (k) provides petitioner no support, however, for two reasons. First, this Court squarely foreclosed an expansive reading of subsection (k) in *Pacific Gas & Electric*: It held that subsection (k) "does not represent an affirmative grant of power to the States." 461 U.S. at 210. The Court explained that subsection (k) simply "underscored the distinction drawn in 1954 between the spheres of activity left respectively

The critical facts on which the Court based its decision not to preempt the state laws in *Pacific Gas & Electric* and in *Silkwood* are therefore absent here. Unlike *Pacific Gas & Electric*, the state law at issue here does *not* operate in the field of economic concerns expressly ceded by Congress to the states. Unlike *Silkwood*, there is no legislative history of any kind from which to draw an inference of congressional intent not to preempt these state law remedies. More striking still, unlike in *Silkwood*, Congress here has enacted a comprehensive remedial and enforcement scheme, providing not only reinstatement and back pay, but also full compensatory relief, costs, and attorney's fees for those who suffer injuries of the sort alleged here. *E.g.*, *DeFord* v. *Secretary of Labor*, 700 F.2d 281, 288-89 (6th Cir. 1983). Under this Court's established field preemption doctrine, as applied in both *Pacific Gas & Electric* and in *Silkwood*, there is no basis for exempting petitioner's claim from preemption.

D. State Law That Infringes On A Field Reserved Exclusively For Federal Control Is Preempted Regardless Of Its Purpose.

Because they have no evidence that Congress intended to allow the States to regulate the "whistleblower" aspect of nuclear operations and safety, petitioner and the United States have resorted to the argument that state law may invade a field exclusively reserved to the federal government so long as the state's *purpose* in passing its law is different from the purpose behind the federal law. See Pet. Br. 10; S.G. Br. 7, 12-14. That argument

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to the Federal Government and the States." *Id.* Second, as the Court also explained in *Pacific Gas & Electric*, subsection (k) by its plain terms "limits only the pre-emptive effect of 'this section,' that is, § 274 [governing federal-state agreements]." *Id.* It therefore does not serve to limit the preemptive scope of other sections, such as Section 53, 42 U.S.C. § 2073 (under which respondent's facility is licensed) or Section 210 of the ERA. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492-94 (1987).

fundamentally distorts the doctrine of field preemption as this Court has consistently applied it.[24]

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), this Court addressed a federal statutory scheme giving "exclusive" authority to the Secretary of Agriculture to license and regulate warehouses. 331 U.S. at 233. In light of this exclusive authority, the Court established the following test for determining questions of preemption:

> The test, therefore, is whether *the matter on which the State asserts the right to act is in any way* regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.

Id. at 236 (emphasis added). *Rice* squarely forecloses the Solicitor General's theory of preemption, because what matters according to *Rice* is not the purpose for the state's action but "the matter on which the State asserts the right to act." *Id.* As *Rice* makes plain, once a court finds that this matter is one that is "in any way regulated by the Federal Act," the state law is preempted. *Id.* In subsequent decisions, this Court has

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[24] *Amici* NCSL, *et al.*, are more open in their attempt to undo the doctrine of field preemption. They argue (Br. 15-16) that in *Silkwood* this Court abandoned field preemption in the nuclear field and held that "preemption analysis in matters nuclear would henceforth focus on whether 'there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law'" (quoting *Silkwood*, 464 U.S. at 256). But in the very passage in *Silkwood* on which NCSL relies, the Court explains that conflict preemption is relevant *only* "insofar as damages for radiation injuries are concerned" *because* Congress had expressly indicated that its preemption of the field of nuclear safety did not extend to state tort law remedies for such injuries. *Id.* Apart from this misreading of *Silkwood*, neither the NCSL nor the Solicitor General explains why the Court should overrule decades of settled preemption law or substitute "conflict" preemption standards for field preemption standards in an area of unquestioned federal supremacy.

squarely rejected the "suggest[ion] that . . . [preemption] should depend upon whether the *purposes* of the two laws are parallel or divergent." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963) (emphasis in original); see, *e.g.*, *id.* ("The test of whether both federal and state regulations may operate . . . is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives"); *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 618-19 (1986) (although city's purpose is "simply" to exercise "a traditional municipal function," its action is preempted because it "intrudes into the collective bargaining process"); *Perez v. Campbell*, 402 U.S. 637, 652 (1971) ("such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law").[25] Compare Br. for United States at 26-27, *Pacific Gas & Electric* v. *State Energy Resources Conservation and Dev. Comm'n*, No. 81-1945 (1983) ("This Court has long recognized the irrelevance of legislative motives to questions of preemption").

In *Pacific Gas & Electric*, the Court held the preemption rule announced in *Rice* fully applicable to the field of nuclear safety:

[25] For example, under the Solicitor General's view, a state law prohibiting cable television operators from broadcasting commercials for alcoholic beverages would no longer be subject to field preemption, despite its invasion of the federal government's exclusive authority over cable communications, because the state law "also effectuates a public policy [reducing alcohol abuse] distinct from [the agency's purpose of regulating signal carriage]." S.G. Br. 14 n.8. But that result is flatly inconsistent with this Court's decision in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 704-05 (1984) (state law prohibiting alcoholic beverage commercials "trespasses into the exclusive domain of the FCC" and is preempted).

> When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S., at 236.

461 U.S. at 212-13. The application of this test here is straightforward. The "matter on which the state asserts the right to act" is the emotional distress allegedly suffered by an employee at a nuclear facility because her employer allegedly retaliated against her for raising safety concerns about the plant. This is a matter that is directly regulated by federal law as part of a comprehensive scheme of nuclear licensing exclusively reserved by Congress to the NRC. Under the test established in *Rice* and reaffirmed in *Pacific Gas & Electric*, petitioner's claim is preempted because Congress has deliberately and carefully occupied this field.

The Solicitor General's suggestion (S.G. Br. 12-13) that this Court somehow altered this basic preemption principle by examining the purpose behind the California statute in *Pacific Gas & Electric* is flatly wrong. Although the Court examined the state's legislative purpose, it did so solely to determine whether the regulation fell within the limited area that Congress explicitly carved out of the otherwise preempted field.[26] Not only did the Court in *Pacific Gas & Electric* explicitly reaffirm the reasoning in *Rice* (461 U.S. at 212-13), it expressly stated that the state legislature's purpose was irrelevant to the question of field preemption:

[26] The Court explained that an inquiry into legislative purpose was essential in order to determine how that law should be "construed and classified." *Pacific Gas & Electric*, 461 U.S. at 212-13. As the Court explained, "[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field," while a moratorium "aimed at economic problems," the resolution of which Congress had expressly ceded to the States, does not. *Id.* at 213.

> At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, *even if enacted out of nonsafety concerns*, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation.

461 U.S. at 212 (emphasis added). That holding lays to rest petitioner's and her *amici*'s heavy reliance upon the purpose of state law as a legitimate basis for avoiding preemption in this case.

II. PETITIONER'S STATE LAW CLAIM IS PREEMPTED BECAUSE IT STANDS AS AN OBSTACLE TO THE FULL ACHIEVEMENT OF CONGRESS'S OBJECTIVES IN REGULATING THE SAFETY AND OPERATIONS OF NUCLEAR FACILITIES.

As discussed above, when Congress has reserved a particular field to the exclusive control of the federal government, state regulation that trespasses on that field is preempted regardless of whether it conflicts with or even complements federal law. Petitioner's claim, however, also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. at 67. This frustration of congressional purpose establishes an independent basis for preemption under this Court's conflict-preemption principles. *Maryland* v. *Louisiana*, 451 U.S. 725, 747 (1981).

In analyzing conflict preemption, Section 210 should not be viewed as "merely a single statutory provision granting a remedy to employees in one industry for one type of discrimination by employers." S.G. Br. 17. Section 210 is "'a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985), quoting *Northwest Airlines, Inc.* v. *Transport Workers, Inc.*, 451 U.S. 77, 97 (1981). In examining such schemes, the Court has observed that the remedies Congress has chosen to provide and to omit must be presumed to reflect important policy choices, and has preempted state law that would upset the "careful balancing" that these choices reflect. *Pilot Life Ins. Co.* v. *DeDeaux*, 481 U.S. 41, 54 (1987).[27] Furthermore, Section 210 must be analyzed not in isolation, or against employee protection provisions in other statutes,[28] but against the background and purposes of the ERA and the Atomic Energy Act. *International Paper Co.* v. *Ouelette*, 479 U.S. 481, 493 (1987) (for preemption purposes, statutory provision must be analyzed in the context of the statute "as a whole, its purposes and its history").

A. Congress's Objective In Enacting Section 210 Was To Create A Balanced Scheme That Would Further The Goal of Ensuring The Safe Operation Of Nuclear Facilities.

Section 210 is not concerned with the ordinary terms of employment in the nuclear industry, but with a distinct aspect of the employment relationship: protecting employees against job-related retaliation based on their report of possible safety hazards. As we have discussed, the structure, legislative history and regulations implementing Section 210 all reveal the basic point that the

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[27] See, *e.g.*, *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 619 (1986); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 109 S.Ct. 971, 975 (1989); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 588 (1979).

[28] Employee protection provisions in other statutes are of little relevance here. First, those statutes, which typically adopt a joint federal/state approach to regulation, differ fundamentally from the Atomic Energy Act. *Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 16 (1976). Second, the provisions themselves vary significantly across statutes. For example, two such provisions allow employees to obtain punitive damages, see note 15, *supra*, while one does not even provide compensatory relief. 29 U.S.C. § 160(c). Each provision therefore reflects Congress's attempt "to tailor [employee protection] to the needs of th[e] bill." 120 Cong. Rec. 36,393 (1974) (statement of Rep. Heinz).

employee protection provided by Section 210 is an important means to the fundamental goal of ensuring the safe operation of nuclear facilities.

Allowing state tort claims for injuries that are compensable under Section 210 would frustrate two important safety-related purposes of Section 210. First, allowing such claims would significantly delay or eliminate notification to the NRC that an allegation of retaliation has been made, an incident that is itself a serious safety concern. Second, allowing such claims would undermine Congress's goal of ensuring that employers are not unduly deterred from taking responsible disciplinary action. Thus, the courts below correctly held that petitioner's claim directly impeded the purposes of Section 210 as reflected in the various elements of this remedial scheme.

B. Failure To Preempt State Law Claims For Injuries Arising Out Of Conduct Regulated By Section 210 Would Preclude This Statute From Fully Achieving Its Purposes

1. Allowing employees to bring state tort claims based on the same conduct governed by Section 210 would seriously impair the ability of the NRC to fulfill its statutory mandate to ensure nuclear workplace safety. *E.g.*, 47 Fed. Reg. 30,452 (1982). While Section 210 requires employees to file their claims of workplace discrimination within 30 days, and requires the Secretary to investigate such claims promptly, state tort claims have statutes of limitations measured in years rather than days; an employee therefore could delay for years before bringing her claim. Moreover, even if the claim is brought in court relatively quickly, such a filing does not trigger any notice to the NRC.

Petitioner argues that as a practical matter the NRC will always receive notice because the premise for the retaliation will necessarily be a complaint to the NRC. But this argument is flawed in two fundamental respects. First, Section 210 repeatedly has been held to preclude retaliation not only for complaints made to the

NRC, but also for threats to complain to the NRC and for complaints voiced solely to the employer.[29] Second, and more fundamentally, the NRC views an act of retaliation itself as a safety violation of significant concern —potentially serious enough to warrant revocation of a license. 10 C.F.R. § 70.[illegible](c); see page 20, *supra*. State law remedies that allow employees to bypass the statutorily provided complaint procedures and therefore fail to notify the Secretary (who in turn notifies the NRC) of retaliatory employment action seriously impede a central purpose of the statute.[30]

2. Allowing state law claims such as petitioner's to go forward also would deter employers from taking appropriate disciplinary action by creating considerable uncertainty and inconsistency in the treatment of employ-

[29] All appellate courts (but one) that have reached the issue have held that Section 210 applies to retaliation for safety complaints voiced only to the employer. See, *e.g.*, *Mackowiak* v. *University Nuclear Sys., Inc.*, 730 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505, 1511-13 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Consolidated Edison Co. of N.Y., Inc.* v. *Donovan*, 673 F.2d 61 (2d Cir. 1982). But see *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029, 1031 (5th Cir. 1984). The Secretary has consistently ruled that internal complaints constitute protected activity, *Lopez* v. *West Texas Util.*, 86-ERA-25 (July 26, 1988) (citing *Francis* v. *Bogan*, 86-ERA-8 (April 1, 1988)), and has expressly rejected *Brown & Root*. *Nunn* v. *Duke Power Co.*, 84-ERA-27 (July 30, 1987).

[30] The Department of Labor recently recognized the potential for conflict between a state tort remedy and Section 210. During hearings on H.R. 3368, an omnibus whistleblower protection bill currently pending in Congress, the Solicitor of Labor testified that "in order to preclude duplicative State law proceedings," the bill "should preempt State whistleblower claims premised on State wrongful discharge statutes and common law." *Whistleblower Protection Act: Hearing on H.R. 3368 Before the Subcomm. on Labor-Management Relations of the House Com m. on Education and Labor*, 101st Cong., 1st Sess. 69 (1989). The Administration later explained that a federal remedial scheme should preempt state law claims because otherwise "the federal agency with substantive health and safety responsibilities" would not be notified "and an important goal of [the federal law] would be frustrated." *Id.* at 246.

ment discrimination claims. Subsection (g), which precludes recovery for an employee who "deliberately causes a violation of any requirement of [the Energy Reorganization] Act or of the Atomic Energy Act" (42 U.S.C. § 5851(g), reflects Congress's concern not to deter employers from taking appropriate disciplinary action where necessary to protect workplace safety. As the district court found, state tort law contains no analogue to subsection (g).

The Solicitor General suggests that the subsection (g) exemption could be treated by juries as a federal defense. S.G. Br. 21. Such an approach does not avoid the conflict problems, but compounds them. Treating subsection (g) as a "defense" for the jury merely to weigh against plaintiff's claims would still conflict with Congress's intent, because subsection (g) *excludes* from coverage employees who deliberately cause nuclear violations; treating subsection (g) as an absolute bar to relief under state law, however, merely begs the question why, if subsection (g) effectively preempts state law, the balance of Section 210 does not do so as well. Moreover, the Solicitor General's disagreement with the courts below over the scope and meaning of subsection (g) demonstrates how employers will be subjected to conflicting determinations of liability even if subsection (g) is transformed into a federal defense.[31]

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[31] The Solicitor General's interpretation that subsection (g) bars relief only for employees who "have 'blown the whistle' on the very safety violation that they have caused" (S.G. Br. 22 n.14) is unduly narrow. It authorizes the Secretary of Labor to *reinstate* (and provide compensatory relief to) employees who have *deliberately caused* numerous violations of the Atomic Energy Act, so long as they have reported other safety violations to the NRC. Surely Congress intended to foreclose such a dangerous result when it added subsection (g).

Moreover, as a practical matter the Solicitor General's interpretation would significantly deter licensed employers from taking appropriate disciplinary action. Because alerting their supervisors or the NRC to actual or potential safety violations is one of the basic responsibilities of all employees in a nuclear facility, virtually any employee could claim that disciplinary action was in response to an "unrelated" safety complaint to someone. Nothing in the language of subsection 210(g) requires this odd construction; indeed, Congress's express purpose for including subsection (g) was "to avoid abuse of the protection afforded in this section." S. Rep. No. 848 at 30.

This legal inconsistency will be further compounded by the confusion that will arise as juries are asked to evaluate the facts related to a subsection (g) issue. To determine whether an employer acted retributively or responsibly in changing an employee's terms of employment, juries will be required to resolve technically difficult factual questions involving the meaning and significance of various provisions of the Atomic Energy Act, the ERA, and the Commission's long and complex set of regulations. In this case, for example, any judgment whether the Company acted responsibly or reprehensibly necessarily involves a determination whether petitioner's intentional failure to clean up contaminated matter violated "any requirement" of the ERA or Atomic Energy Act, and whether and to what degree petitioner's willingness to violate safety rules (as she concededly did) in order to dramatize her safety concerns itself posed a threat to the health and safety of other employees. Unlike the Secretary of Labor, however, juries addressing these issues will not be able to draw upon the "full cooperation" of the NRC or on prior experience in the field.

Furthermore, claims for intentional infliction of emotional distress arising out of allegedly retaliatory employment actions necessarily require an evaluation whether the employer's conduct was "outrageous," but the standards for determining what is "outrageous" vary widely from state to state. *Atchison, T. & S. F. Ry.* v. *Buell*, 480 U.S. 557, 568-70 (1987); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 55 (1988). And no matter what standard applies in a given state, in order to determine whether an employer acted "outrageously" in retaliating against a whistleblower, the jury will necessarily have to

evaluate whether the employer had valid reasons, including reasonable safety-based concerns, to support the employment-related responses it made. Thus, even apart from subsection (g), the possibility that the jury's evaluation of the employer's and employee's competing safety interests will differ from that of the Secretary of Labor and the NRC is obviously real, and the consequent uncertainty over the scope of liability will inevitably deter employers from taking appropriate disciplinary action. Because such deterrence will upset the careful balance that Congress created in Section 210, such state law claims should be preempted.

C. Allowing Employees to Seek Punitive Damages Conflicts Fundamentally With Congress's Intent.

By allowing employees to seek a remedy—punitive damages—that Congress deliberately withheld from them under Section 210, state law claims such as petitioner's both exacerbate the likelihood that employees will bypass Section 210 review altogether and further deter employers from taking the responsible disciplinary action that Congress intended. This clear conflict with Congress's purposes requires preemption of petitioner's claim.

There is no doubt that Congress's decision not to allow employees to obtain punitive damages was deliberate. "'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (citation omitted). Congress knows how to make punitive damages available to employees when it wants to, because the whistleblower provisions in two other statutes expressly grant employees authorization to obtain them. See note 15, *supra*. Here, moreover, Congress did not overlook the question of punitive damages; it expressly reserved to the Secretary the discretion to determine when to seek them, and even then only for the separate act of deliberately ignoring the Secretary's remedial order. 42 U.S.C. §§ 5851(b)(2)(B), 5851(d). Replacing the Secretary's carefully bounded discretion with the unlimited private interest of an employee and her attorney flatly conflicts with Congress's intent.

In addition, this Court has previously recognized the powerful impact that the availability of punitive damages may have on the balance of incentives inherent in a statutory scheme. In *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979), for example, this Court refused to allow a discharged railroad employee to recover punitive damages for a union's breach of the duty of fair representation. The Court held that punitive damages "could undermine [the] careful accommodation" of interests reflected in the statute (*id.* at 50), and in particular that unions "could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members." *Id.* at 52.

Similarly, to allow employees in the nuclear industry to seek enormous punitive damage awards (such as the $2.3 billion sought here) under shifting state standards would significantly deter employers from taking any action to change the terms, conditions or privileges of a particular employee's job. Such a powerful deterrent would perhaps be consistent with the interest in avoiding retaliation and might be justified if there were no tradeoffs, that is, if no employee ever violated safety requirements or otherwise presented a risk to the safe operation of a nuclear facility Nonetheless, certain employees do pose this risk in the workplace, as Congress's decision to include subsection (g) reveals. Decisions of the Secretary under Section 210 and of courts in analogous contexts confirm that it is vitally important to allow nuclear industry employers some room to act in dealing with employees who are perceived as irresponsible.[32] If the em-

[32] See note 16, *supra*; see also *Iowa Elec. Light & Power Co.* v. *Local Union 204*, 834 F.2d 1424, 1429 (8th Cir. 1987) (employee who violated federal safety rule "is no longer to be trusted to work

ployer in fact acts in retaliation for safety complaints, Section 210 provides a remedy. But the decision to preclude a punitive damages claim reflects Congress's view of the importance of constructing a careful balance between competing safety interests.

Finally, permitting state courts to award enormous punitive damages will directly undermine Congress's avowed goal to have employees bring Section 210 claims promptly to the Secretary's attention. See pages 21-22, 38-39, *supra*. It is difficult to believe that very many employees will choose Section 210 as the preferred remedy if they may pursue multi-million dollar awards in state court.[33] Indeed, the NRC is unlikely to learn of the most serious complaints, because these complainants will have the most incentive to seek a windfall punitive damages award under state law. The two *amici* briefs filed on behalf of petitioner by "plaintiffs' trial lawyers" are vivid testimony to a crucial fact of life: Few plaintiffs' lawyers are likely to recommend that their clients seek redress from the Secretary of Labor when a pot of gold —claimed in this case to be $2.3 billion—may lie at the end of the state court rainbow. In sum, to allow employees to seek punitive damages in court before a jury would create a powerful incentive to avoid administrative review altogether, thereby (1) frustrating Congress's goal of ensuring prompt investigation of retaliation complaints, (2) overriding the Secretary's carefully circumscribed discretion when to seek punitive damages, and

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in such a critical [nuclear power] environment . . . [because he] will jeopardize the safety of the public"); *Ashcraft* v. *University of Cincinnati*, 83-ERA-7 (Secretary's Decision, Nov. 1, 1984) (Section 210 complaint dismissed because employee suspended for mishandling radioactive materials).

[33] Although employees would not be barred jurisdictionally from filing a Section 210 claim as well as a state court suit, they would have no incentive to do so and good reason not to. An adverse decision from the Secretary would lead to dismissal of the state court action by collateral estoppel, see *University of Tennessee* v. *Elliot*, 478 U.S. 788, 797-98 (1986), and any damages the Secretary might award would likely be subtracted from a subsequent jury award.

(3) deterring nuclear employers from taking appropriate disciplinary action.

III. BY ANALOGY TO LABOR PREEMPTION DOCTRINES, SECTION 210 PREEMPTS A CLAIM FOR EMOTIONAL DISTRESS ARISING OUT OF ALLEGED EMPLOYMENT DISCRIMINATION IN RETALIATION FOR REPORTING NUCLEAR SAFETY COMPLAINTS.

Petitioner suggests that Section 210 is appropriately analyzed as a labor relations provision that governs certain aspects of the employer-employee relationship. Pet. Br. at 26-31; but see S.G. Br. at 19 n.12. Although in our view Section 210 is inextricably a part of the field of nuclear safety regulation, the analogy to labor law simply underscores the case for preemption, and provides an independent basis for affirming the judgments below.

This Court has long recognized the "comprehensive regulation of industrial relations by Congress." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 239 (1959). Because Congress "entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*id.* at 242), the reasons underlying preemption have their "greatest force" when states attempt to regulate labor relations. *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 193 (1978). Section 210 thus lies at the intersection of two predominant, traditional federal interests, each of which alone has been held sufficient to preempt state law. *Cf. Boyle* v. *United Technologies Corp.*, 108 S.Ct. 2510, 2514-2516 & n.4 (1988) (combination of two uniquely federal interests weighs in favor of preempting liability under state law).

Federal labor law and its premption doctrines are particularly significant in two respects. First, as recognized by petitioner, to the extent that Section 210 may be fairly characterized as regulating the employment relationship, its nearest analogy lies in Section 8 of the National Labor

Relations Act ("NLRA").[34] Like Section 210, the NLRA prohibits certain discrimination by the employer in retaliation for protected employee conduct. The point at which Section 210 and the NLRA diverge—remedies (limited under the NLRA to back pay and reinstatement)—simply reinforces the conclusion that Section 210 preempts petitioner's cause of action. Second, federal labor policy reflects congressional intent to use an administrative scheme "to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286 (1971) (footnote omitted); see also *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 511 (1983). Similarly, Congress used Section 210 to create an administrative scheme that calibrates at the national level the benefits and risks of affording employee protection to assure the optimum protection of health and safety in the nuclear workplace and of the public generally.

A. Under Labor Preemption Principles, Petitioner's Claim Is Preempted Because It Arises Out Of Conduct Addressed By Section 210.

In holding that Section 210 preempts petitioner's claim for emotional distress arising from changes in the terms and conditions of her employment, the district court correctly applied the labor preemption analysis enunciated in *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977). The plaintiff in *Farmer* alleged that union officials "had intentionally engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress resulting in bodily injury." *Id.* at 293. The particular acts constituting "outrageous conduct" were discrimination in referrals to employers and "a campaign of personal abuse and harassment." *Id.* at 292 & n.2.

[34] Congress indicated that Section 8(a)(4) was one of the provisions on which Section 210 was patterned. S. Rep. No. 848, 95th Cong., 2d Sess. 29, *reprinted in* 1979 U.S. Code Cong. & Admin. News 7303, 7303. Section 8(a)(4) provides that it is an unfair labor practice for an employer or union "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act]." 29 U.S.C. § 158(a)(4). The National Labor Relations Board has exclusive jurisdiction to hear complaints concerning unfair labor practices. 29 U.S.C. § 160; see *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 508-509 (1983).

This Court held that while some state tort claims for intentional infliction of emotional distress would not be preempted by federal law, "[u]nion discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based." *Id.* at 305. The Court explained that to avoid preemption:

> it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Id. (footnote omitted). A remand was therefore necessary because the "focus of the trial was on employment discrimination rather than the intentional infliction of emotional distress." *Id.* at 306 n.14.

Under *Farmer*, petitioner's claim is preempted because petitioner does not allege tortious conduct beyond the job-related retaliation addressed by Section 210. Instead, she complains solely about emotional distress caused by the circumstances surrounding the changes in the terms and conditions of her employment following her safety reports. As already discussed, the district court here correctly recognized the difference stressed in *Farmer* between tort claims that arise out of conduct subject to exclusive federal regulation and tort claims that arise out of conduct not subject to federal regulation. Pet. App. 28a. When petitioner's complaint is stripped of the impermissible, preempted claims, it fails to state a cause of action for intentional infliction of emotional distress under state law. Because both courts below agreed on that issue of North Carolina law, this

Court should defer to that judgment. See *supra*, page 28 and note 19.[35]

B. Labor Preemption Principles Require Preemption Where, As Here, There Is An Imminent Possibility That State Law Remedies Will Conflict With Federal Law.

Allowing a state to regulate the conduct alleged in this case would not merely provide an additional unintended remedy to employees but also would seriously clash with Congress's carefully tailored administrative scheme and evoke the very conflicts that the preemption principles governing employment relations are designed to prevent. First, this Court has recognized that " 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.' " *Wisconsin Dept. of Indus.* v. *Gould, Inc.*, 475 U.S. 282, 286 (1986) (quotting *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 498-499 (1953)); see *Garmon*, 359 U.S. at 247. Second, the coexistence of various state court procedures with a federal administrative scheme inevitably creates a direct conflict with Congress's purposes, because "[c]onflict in technique can be fully as disruptive . . . as

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[35] Petitioner's reliance upon *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) and *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656 (1954) is similarly misplaced. In these cases, state law was not preempted because "[n]othing in the federal labor statutes protects or immunizes from state action violence or the threat of violence. . . ." *Farmer*, 430 U.S. at 299. But petitioner's claim is not of that kind; it arises solely out of changes in the customary terms of employment and is—as the Labor Department ALJ already ruled—squarely covered by timely complaint under Section 210.

Petitioner's reference to *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1880 (1988), is inapposite. *Lingle* involves Section 301(a) of the Labor Management Relations Act, which preempts state-law claims "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement." *Id.* at 1881. Although any analogy to Section 301 seems strained, the fact that petitioner's state law claim "would depend on the meaning of" federal statutes and regulations argues once again for preemption.

conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286 (1971); *Gould*, 475 U.S. at 286, 288 n.5. These concerns about substantial conflicts apply with equal force to Section 210. See Part II, *supra*.

Even if petitioner's claim were entirely consistent with the purposes of Section 210, moreover, the fact remains that a "simple congruity of legal rules does not, in [the labor relations] area, prove the absence of untenable conflict." *Lockridge*, 403 U.S. at 290. For instance, this Court in *Gould* struck down a state law barring firms who have violated the NLRA from conducting business in the state because such a remedy "would interfere with Congress' 'integrated scheme of regulation' by *adding* a remedy to those prescribed by the NLRA." 475 U.S. at 287 (quoting *Garmon*, 359 U.S. at 247) (emphasis added). It made no difference in *Gould* that the "supplemental" state remedy was "different in kind from those that may be ordered by the [NLRB]." *Id.* (quoting *Garmon*, 359 U.S. at 243); see *Lockridge*, 403 U.S. at 292. The proper focus is not whether the state remedy would be available under federal law, but rather on the nature of the regulated activities. *Gould*, 475 U.S. at 287. "[T]o allow the State to grant a remedy . . . which has been withheld from the [NLRB] only accentuates the danger of conflict," *Garmon*, 359 U.S. at 247, "because 'the range and nature of those remedies that are and are not available is a fundamental part' of the comprehensive system established by Congress." *Gould*, 475 U.S. at 287 (quoting *Lockridge*, 403 U.S. at 287)). Thus, the analogy to labor law underscores the conclusion that Section 210 preempts petitioner's claim.

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At bottom, this case calls on the Court to reconcile the competing interests of the federal and state governments in an area of extreme sensitivity—nuclear safety. Unlike petitioner, the Company is not asking the Court to accord preeminence to either set of interests. We

recognize that the State of North Carolina has a substantial interest in ensuring that victims of extreme and outrageous conduct are compensated for their emotional injuries. But there is nothing in the exclusivity of Section 210 that undermines the State's interest. For employer conduct prohibited by Section 210, the Secretary of Labor will provide compensation that serves the State's interest. For conduct beyond the bounds of Section 210, the State remains free to provide whatever remedies the State deems appropriate.

On the other side of the ledger, allowing Section 210 to operate free of state law interference will protect the overriding federal interest in promoting nuclear safety. Section 210's role in this regard is critical because the NRC properly regards employer retaliation itself a serious nuclear safety hazard. Thus, the Court simply cannot allow the incentives created by this state tort claim to interfere with Section 210 and still be faithful to Congress's intent to retain exclusive federal control over safety in the operation of nuclear facilities.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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